

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK**

----- X
ATRIUM GROUP DE EDICIONES Y
PUBLICACIONES, S.L., FRANCISCO
ASENSIO,

Plaintiffs,

v.

HARRY N. ABRAMS, INCORPORATED,
JOHN DOES 1-10,

Defendants.
----- X

Civil Action No. 08-CV-01569 (CM)

Electronically Filed

**AFFIDAVIT OF EDWARD J. DAVIS IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS**

STATE OF NEW YORK)

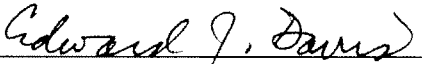
) ss.:

COUNTY OF NEW YORK)

Edward J. Davis, being duly sworn, deposes and says:

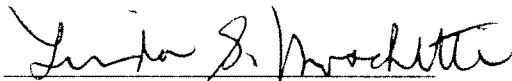
1. I am a partner in the firm of Davis Wright Tremaine, LLP, attorneys for Harry N. Abrams, Inc., defendant in the above-captioned action, and I submit this affidavit in support of the motion to dismiss five of the six claims contained in the Complaint.

2. Attached as Exhibit A is a true and correct copy of the Complaint in the above-captioned action, filed February 15, 2008.



Edward J. Davis (ED 1266)

Sworn to before me this
17th day of April, 2008.



Notary Public
LINDA G. MOSCHETTI
Notary Public, State of New York
No. 01MO4723235
Qualified in Bronx County
Term Expires August 31, 2010

EXHIBIT A

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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ATRIUM GROUP DE EDICIONES Y
PUBLICACIONES, S.L., FRANCISCO
ASENSIO,

Plaintiffs

v.

HARRY N. ABRAMS, INCORPORATED,
JOHN DOES 1-10

Defendants.

08 CV 01569

COMPLAINT

**JURY TRIAL
DEMANDED**

Plaintiffs Atrium Group De Ediciones Y Publicaciones, S.L. and Francisco Asensio by their attorneys Zeynel Karcioglu, Esq. and The Law Office of Barry E. Janay, P.C., as and for their complaint against Defendants allege on their own knowledge, and also upon information and belief, as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this action as a result of Defendant Harry N. Abrams, Incorporated misappropriation and infringement of Plaintiffs intellectual property and to stop the Defendants from continuing to copy and profit from, and encourage and enable others to copy and profit from the infringement of Plaintiff's copyrights, trademarks, and trade dress throughout the United States, North America and over the Internet. Defendant has misappropriated the content, photos, trade dress and layout of various books which were the work of the Plaintiff. Defendant revised an already existing English translation of these works, submitted them to the U.S. Copyright Office under false pretenses, indicating that they owned rights in the works when in fact they did not. Defendant then profited by distributing the books en masse through retail outlets such as Amazon.com, Barnes & Noble Booksellers, Borders Bookstores, and others. Plaintiffs seek injunctive relief, monetary and other appropriate relief arising under the Copyright Act of 1976, as amended,, 17 U.S.C. §§ 1010, *et seq.*, the Lanham Act, as amended, 15 U.S.C. §§ 1051, *et seq.*, and New York common law and General Business Laws.

THE PARTIES

2. Plaintiff Atrium Group De Ediciones Y Publicaciones, S.L. (hereinafter "Atrium") is a corporation organized and duly existing under the laws of Spain, having its principal address located at Edificios Trade Gran Vía Carlos III, 84, 3ª, 08028 Barcelona, SPAIN.

3. Plaintiff Francisco Asensio ("Asensio") is an individual citizen of Spain. His primary residence is located at Edificios Trade Gran Vía Carlos III, 84, 3ª, 08028 Barcelona, SPAIN.

4. Defendant Harry N. Abrams, Incorporated ("Abrams") is a New York domestic business corporation whose principal executive office is located at 100 Fifth Avenue, New York, NY 10011-6903, Defendant Harry N. Abrams, Incorporated also has significant operations located at 115 West 18th St., 6th Floor, New York, NY 10011-4113.

5. Upon information and belief, John Does 1-10 are various individuals and entities responsible for selling and aiding others in the promotion of selling misappropriated works of the Plaintiffs.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, §1338, and §1367 as the present case arises under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, as amended, the Copyright Act, 17 U.S.C. 101, *et seq.* as amended, and further arises under claims of false designation of origin, trade dress infringement, and unfair competition under the common law of the State of New York and as is hereinafter more fully described.

7. Defendants are incorporated in, have their headquarters in, and transact business within the City and State of New York, and, upon information and belief, New York City is the situs of the actions giving rise to the Plaintiffs claims.

8. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1400(a), and/or 1391(b) and (c), as each of the Defendants resides in, and/or a substantial portion of the events giving rise to the claims herein arose within this judicial district.

FACTS COMMON TO ALL CAUSES OF ACTION

9. Plaintiff Atrium is a corporation owned and operated by Plaintiff Francisco Asensio. Atrium is an independent publisher specializing in high-quality books about architecture, design, furniture and decoration. Atrium produces its books and licenses the rights

to other publishers to produce them around the world in various languages such as English, Spanish and French.

10. Asensio is a Spanish individual, and the author of many books licensed by Atrium. Asensio authored the works, "New Architecture: An International Atlas," "International Beach Houses," at issue in this action. Oscar Asensio, a Spanish individual, authored "Des!gn Des!gn, Furniture and Lights" (also referred to at times herein as "DesignDesign"). Atrium has exclusive rights to license all of the works at issue in this action.

11. In early 2006, Plaintiff Atrium began negotiations with La Martiniere Groupe ("La Martiniere") concerning the distribution of several titles in the field of architecture and design in various territories around the world. Conversations with La Martiniere also included discussions concerning a potential purchase of Atrium by La Martiniere, a French company that is the parent company of Defendant Abrams.

12. At and around the same time, Atrium also began negotiations with Defendant for the English language rights North America. The negotiations centered around the licensing and distribution of rights to several books, including: Des!gn Des!gn, New Architecture: An International Atlas, International Beach Houses (the "Works"). Asensio, and Oscar Asensio created these works between 2004 and 2005 in Spain, and Atrium is the exclusive owner of all rights in and to these Works.

13. During the time period surrounding the negotiations between La Martiniere and Atrium, Defendant Abrams obtained copies of optical disks containing the Works. By September of 2006 negotiations between Atrium to La Martiniere had ceased, but Atrium was also unable to reach any agreement with Abrams, and the parties decided not to continue negotiations.

14. On or about April 2007 Atrium became aware that Defendant had copied, published, and was distributing the Works throughout the United States.

15. When Atrium inquired as to why there were sales of the Works in the United States, Defendant Abrams denied any such sales. Despite Abrams' representations, Plaintiff Atrium in fact purchased English language copies of "Des!gn Des!gn" from Barnes & Noble booksellers located at 160 East 54th Street, New York, NY 10022 on January 11th, 2008, and also purchased "New Architecture: An International Atlas" over the Internet at amazon.com on January 16th, 2008. Attached hereto as Exhibit A are Purchase Receipts and Book Availability Information for the Works.

16. Plaintiff Atrium has further seen copies of "International Beach Houses" in the English language on websites such as barnesandnoble.com and amazon.com. See Ex. B.

17. Based upon the above, and further upon information and belief, numerous copies of the title have been sold in stores as well as via the internet, without Plaintiffs' knowledge or consent.

18. Plaintiff Atrium has not granted any rights, title or license to Defendant, nor has it ever consented to the Defendants' copying, reproduction, distribution, creation of derivative works or sale of the Works in the United States.

19. Defendant knowingly, intentionally, maliciously and in bad faith, copied, created derivative works of, published, sold, and continues to sell in commerce, the titles "International Beach Houses," "Des!gn Des!gn: Furniture and Lamps," and "New Architecture: An International Atlas;" in New York City, and across the United States.

20. Defendant's copies of the Works do bear Abrams' logo on them, and do not bear Atrium's mark or logo anywhere on the outside of the books.

21. In light of the foregoing, Defendant Abrams has misappropriated the intellectual property of Plaintiff Atrium and Francisco Asensio, infringed on Atrium's copyrights, trademarks, trade dress, and has engaged in unfair business practices, and filed false or misleading applications to the United States Copyright Office, all for commercial purposes and upon information and belief at a substantial profit, and to Atrium's and Asensio's substantial detriment.

FIRST CAUSE OF ACTION

1 Copyright Infringement

22. Plaintiff repeats and realleges paragraphs one (1) through twenty-one (21) as if fully stated herein.

23. Plaintiffs Francisco Asensio and Atrium own exclusive rights in and to the Works under the Federal Copyright Act, 17 U.S.C §§ 101 *et seq.* and the Berne Convention on Copyrights.

24. In or about 2004 and 2005, Fransisco Asensio and Oscar Asensio, both Spanish individuals, authored and published the Works in Spain which is a signatory to the Berne Convention and/or the Universal Copyright Convention. Atrium owns the rights to and in the Works.

25. The Works are original works of authorship, whose rights throughout the United States are exclusively owned by Atrium. At all times relevant to this matter, Defendant had actual and/or constructive notice of Plaintiff Atrium's copyrights in the Works.

26. Defendant Abrams acts violated Plaintiffs' exclusive rights to reproduce, create derivative works, publish, publicly display, offer for sale, and distribute the Works.

27. Defendants' acts are willful and intentional and constitute both direct and indirect infringement under the Federal Copyright Act, 17 U.S.C. §§ 101 *et seq.*

28. Plaintiffs own valid copyrights in and to the Works.

29. Defendant has, without Plaintiff's consent copied, and/or caused others to copy, publish, reproduce, create derivative works of, and distribute the Works, or works that are substantially identical or similar to the Works.

30. The books sold by Abrams are practically identical to the Works in that they contain the exact photographs, layout, design and creative content, and are simply copies and/or derivative works of the already-existing English copies of the Works.

31. Upon discovering Defendant's sale of the infringing titles, Plaintiff Atrium's inspection revealed that a copyright notice had been placed upon each title, indicating "Original English-language edition copyright © 2006 Atrium Group, Barcelona. North American edition copyright © 2007 Abrams, New York."

32. Plaintiffs conducted a search of the Register of Copyrights in the United States Library of Congress which revealed that Abrams obtained copyright registrations in and to "Des!gn Des!gn" (TX0006562545) and "New Architecture : an International Atlas" (TX0006562591). Attached as Exhibit C are printouts from the United States Copyright Office; upon information and belief Defendant is in possession of the original certificates of registration for the above works. Plaintiff never granted any right or license to Defendant to register copyrights in any of the Works, or create derivative works therefrom.

33. Through the acts alleged above, Defendant Harry N. Abrams, Incorporated has violated Plaintiff Atrium's exclusive rights in its Works by copying, displaying, distributing, creating derivative works of, and selling them through various retail channels located throughout North America as well as on the Internet in violation of 17 U.S.C. § 101, et seq., including the exclusive rights provided for in 17 U.S.C. § 106.

34. Defendant Harry N. Abrams, Incorporated has also violated Plaintiff Atrium's right to control the distribution, creation of derivative works and public display of its copyrighted works by copying, creating derivative works from and/or distributing Atrium's titles to its distributors and customers.

35. In addition to directly infringing on Plaintiff Atrium's copyrights, Defendant Harry N. Abrams, Incorporated contributorily and/or vicariously infringed Atrium's copyrights in the Works by controlling, directing, inducing, and/or materially contributing to and profiting from others' copying, distribution, sale, display, and creation of derivative works of Atrium's copyrighted titles. Defendant Abrams has obtained a direct financial benefit from the above alleged activities.

36. Defendant Harry N. Abrams, Incorporated knew or should have known that copying, distributing, displaying, and creating derivative works of Atrium's titles, which Defendant Harry N. Abrams copied, distributed, publicly displayed, and created derivative works from those titles infringed on Atrium's copyrights in those titles.

37. Defendant further undertook the infringing activities set forth herein willfully, knowingly, in bad faith and in reckless disregard of Atrium's and Asensio's rights in and to the Works.

38. Plaintiff Atrium is entitled to statutory and actual damages in an amount to be proven at trial, including profits attributable to the infringement not taken into account in computing actual damages under 17 U.S. C. § 504.

39. Plaintiff Atrium is further entitled to attorneys fees in connection with this action, to be determined after trial.

40. Defendant Abrams' infringement of Plaintiff Atrium's copyrights has also caused Atrium irreparable injury. Unless restrained and enjoined, Defendants will continue to commit such acts. Plaintiff Atrium and Francisco Asensio's remedy at law is inadequate to fully compensate them for these inflicted and threatened injuries, entitling Plaintiff Atrium and Francisco Asensio to remedies including injunctive relief as provided by 17 U.S.C. § 502, and an order impounding or destroying any and all infringing materials pursuant to 17 U.S.C. § 503.

SECOND CAUSE OF ACTION

Misappropriation of Intellectual Property

41. Plaintiff repeats and realleges paragraphs one (1) through forty (40) as if fully stated herein.

42. Based upon information and belief, during Plaintiffs' dealings with Defendant Abrams, and by gaining the Defendant gained access to the Works the Plaintiffs authored and own, and which were created and developed at great expense by Plaintiffs. Defendant, without Plaintiff's consent, printed, and created derivative works of the Works.

43. Defendant Harry N. Abrams, Incorporated continues to willfully distribute, market, offer to sell, sell and use Plaintiff Atrium's Works, and this is misappropriation will continue unless enjoined to protect the Plaintiffs' intellectual property rights.

44. Plaintiff has been damaged by Defendant's misappropriation, misuse, alteration, creation of derivative works and sales of Plaintiffs' intellectual property, in an amount to be determined at trial. To date, Defendant Harry N. Abrams, has earned money from the sales of the infringed Works and has made no payment whatsoever to Plaintiffs Atrium or Asensio.

45. Plaintiff is entitled to damages for Defendant Abrams' unfair competition in an amount to be proven at trial, but in no event less than \$500,000.

THIRD CAUSE OF ACTION

False Designation of Origin

46. Plaintiff repeats and realleges paragraphs one (1) through forty-five (45) as if fully stated herein.

47. Defendant Abrams has placed its own name and trademarks upon each of the Works, without the consent or permission of Plaintiff.

48. Defendant has further failed to place Atrium's marks on the outside any of the Works.

49. Defendant's willful acts constitute a violation of the Section 43(a) of the Lanham Act, 25 U.S.C. 1125(a) through its false designation of origin which is likely to cause confusion as to the origin of the Works amongst the relevant public, consumers and trade.

50. Plaintiff has been irreparably harmed by Defendant's bad acts, and does not have an adequate legal remedy for Defendant's bad acts. Therefore, Plaintiffs seek preliminary and

permanent injunctive relief in this action, seizure of the infringing goods, and corrective advertising by Defendant.

51. Plaintiff further requests actual damages, as well as Defendant's profits in an amount to be determined at trial, but in no event less than \$500,000.

52. Defendant's activities are intentional and malicious, entitling Plaintiff to trebled damages; furthermore, Defendant's actions render this case "exceptional" under the meaning of the Lanham Act, for which Plaintiff seeks its reasonable attorneys fees.

FOURTH CAUSE OF ACTION

(Fraud on the Copyright Office)

53. Plaintiff repeats and realleges paragraphs one (1) through fifty-two (52) as if fully stated herein.

54. On or about April 2007, Defendant, knowing that it had no right, title or license in or to *DesignDesign* or *New Architecture: An International Atlas*, intentionally and in bad faith made material false representations to the Copyright Office in applying for and procuring registration of the two works in the United States Copyright Office; specifically those fraudulent representations included that Defendant had rights title and license to the works, and listing itself as "Copyright Claimant," as well as holding out to the Copyright Office that Defendant had the right to include "new matter" in the form of "Americanized English text."

55. The Copyright Office relied upon Defendant's knowingly false representations to grant copyright registrations to Defendant in *DesignDesign* and *New Architecture: An International Atlas*.

56. Plaintiffs have been irreparably damaged by Defendant's bad acts in Defendants falsely hold out to the Public that it has rights in and to the Works. Furthermore, Plaintiffs are damaged in that they are not publicly, or in the trade, recognized as having any rights in or to *DesignDesign or New Architecture: An International Atlas*.

57. Defendant's copyright registration should inure to Plaintiffs' benefit, and should rightly be transferred to Plaintiffs.

58. The conduct alleged above constitutes violations of 17 U.S.C. § 506(e) in that Defendant Harry N. Abrams, Incorporated knowingly made a false representation of a material fact(s) in the application of a copyright registration provided for by 17 U.S.C § 409, or in any written statement filed in connection with such applications.

59. Plaintiffs seek transfer or modification of the registrations into their own name, as of the date of application, as legal remedies are inadequate to completely redress Plaintiff's damage.

60. Plaintiffs also seek damages arising from Defendant's intentional acts in an amount to be determined at trial, but in no event less than \$500,000.

61. Plaintiffs further seek attorneys fees, the costs of this action, as well as trebled damages arising from Defendants' fraud, in an amount to be determined at trial.

FIFTH CAUSE OF ACTION

Deceptive Business Practices - Violation of N.Y. Gen. Bus. L § 349, §350

62. Plaintiff repeats and realleges paragraphs one (1) through sixty-one (61) as if fully stated herein.

63. Defendant Harry N. Abrams, Incorporated willfully engaged in deceptive acts that have caused injury to the Plaintiffs Atrium and Francisco Asensio.

64. Defendant submitted copyright applications and translated the titles without the consent of the true owner of the titles Plaintiff Atrium and falsely claimed that they owned the rights to the titles, which they did not.

65. The Works are all serial-works, and Defendant has damaged Plaintiffs' ability to sell these Works in the United States and Canada to other publishers.

66. Under New York's General Business Law Sec. 350(e)(3) Plaintiff Atrium and Plaintiff Francisco Asensio are entitled to their attorneys fees in this action, as well as damages arising out of Defendant's bad acts.

SIXTH CAUSE OF ACTION

Unjust Enrichment

67. Plaintiff repeats, re-alleges and reaffirms the truth of paragraphs one (1) through sixty-six (66) above as if fully stated herein.

68. As stated above and repeated herein, Defendant has received financial benefit and remuneration from the sale of the titles "New Architecture: An International Atlas," "International Beach Houses," "Des!gn Des!gn: Furniture and Lamps."

69. As of the date of the filing of this complaint the Plaintiff has not received any advance payment, royalties, remuneration of any kind whatsoever, nor have they received returned copies of the titles thereby depriving them of any and all benefit, despite the fact that the titles have been sold to consumers throughout North America and via the Internet.

70. As a result of the foregoing, the Defendants have been unjustly enriched at the detriment of the Plaintiffs in an amount to be determined at trial.

WHEREFORE, Plaintiff prays that the following relief be granted:

A. Damages in an amount to be determined at trial plus interest from the date the first cause of action arose as well as an order requiring that Defendants, their agents, servants, employees, franchisees, licensees, attorneys and all others in active concert or participation with the Defendant, be enjoined and restrained during the pendency of this action as preliminary injunction and permanently thereafter from:

1. Using, copying, or otherwise exploiting Plaintiffs copyrights and copyrighted works;

2. Using, disclosing, converting, appropriating, retaining, selling, transferring or copying any property of Plaintiffs, in connection with the Defendant's trademarks or otherwise;

3. Using any of the copyrighted or trademarked titles referenced in this Complaint, in connection with any distribution activities.

4. Doing any other act or thing likely to, or calculated to, induce the belief that Defendant is in any way affiliated, connected or associated with the Plaintiff or Plaintiff's business;

5. Unfairly competing with plaintiffs in any manner.

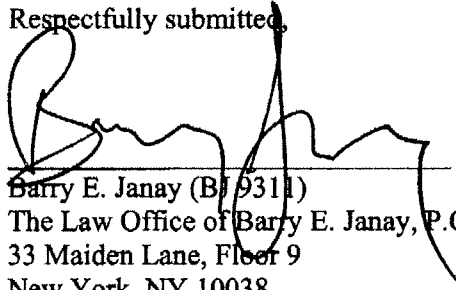
- B. Disgorgement of profits made by selling, distributing, or licensing of Plaintiffs titles, the maximum statutory damages allowable under the U.S. Copyright Act, attorneys fees and punitive damages, plus interest from the date on which the first infringing activity occurred.
- C. Actual damages sustained by the Plaintiffs as well as punitive damages sustained , which resulted from Defendant's Intentional Trademark Infringement.
- D. Actual Damages sustained by the Plaintiffs as a result of the Defendants Negligent Interference with Plaintiffs Prospective Economic Advantages.
- E. Attorney's fees incurred in the instant action as allowable to Plaintiff as the prevailing party under New York's General Business Law § 349, §350 *et seq.*
- F. Restitution damages and disgorgement of profits resulting from Defendants Unjust Enrichment at the expense of the Plaintiffs.
- G. Trebled damages.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury of all issues properly triable by jury in this action.

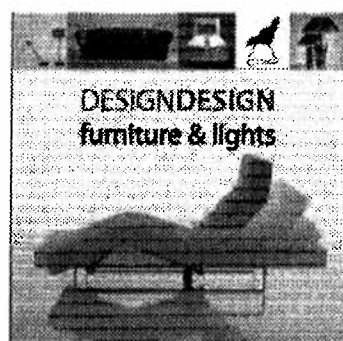
Dated: February 14, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Barry E. Janay', is written over a horizontal line.

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Fax: 208-693-6720
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Exhibit A: Purchase Receipts and Book Availability Information for the Works

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Any Category Arts & Photography Furniture & Carpentry Graphic Design

Instructional & How-To Interior Design

Editorial Reviews

Book Description

What happens when form follows function—and the only boundaries are the laws of physics? As innovative materials and manufacturing techniques become readily available, the limitations of design are rapidly falling away. These advances have led to a redefinition of the spaces we inhabit, as everyday items become objects of art.

DesignDesign: Furniture & Lights is a celebration of originality and innovation, featuring hundreds of beautiful full-color photographs of works by highly acclaimed designers such as Xavier Lust, David Abad, Guido Rosati, Oscar Tusquets, Alvaro Sizaand, Ingo Maurer, and many more. Curated by renowned design expert Oscar Asensio, *DesignDesign* is an essential sourcebook for astute interior designers, collectors, and connoisseurs on the cutting edge.

About the Author

Design expert Oscar Asensio is also the author of *Food Design*. He lives in Spain.

Product Details

Hardcover: 320 pages

Publisher: Harry N. Abrams, Inc. (April 1, 2007)

Language: English

ISBN-10: 0810992949

ISBN-13: 978-0810992948

Product Dimensions: 10.1 x 9.8 x 1.4 inches

Shipping Weight: 3.8 pounds ([View shipping rates and policies](#))

Average Customer Review: ★★★★★ (1 customer review)

Amazon.com Sales Rank: #85,494 in Books (See [Bestsellers in Books](#))

Popular in these categories: ([What's this?](#))

#8 in [Books](#) > [Bargain Books](#) > [Home & Garden](#) > [Interior Decorating](#)

#11 in [Books](#) > [Home & Garden](#) > [Interior Design](#) > [Lighting](#)

#15 in [Books](#) > [Bargain Books](#) > [Arts & Photography](#) > [Architecture](#)

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★★★★★ A wonderful resource any design library will be happy to display., July 27, 2007

By **Midwest Book Review** (Oregon, WI USA) - See all my reviews

Interior design libraries and public lending collections catering to home designers will welcome DesignDesign: Furniture & Lights, a collection of innovative works by a range of designers intended to provide a sourcebook of inspiration and redecorating options. Color photos of chairs, breeze units, light-up acrylic wall lamps in squares or rectangles, and more offer the trendiest of design options suitable for both home and business spaces and accompany design options with notes on construction and effect. A wonderful resource any design library will be happy to display.

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Replies

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No discussions yet

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crafts and hobbies (17 discussions)

woodworking (2 discussions)

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Start a new discussion

Topic:

Active discussions in related forums

Discussion	Replies	Latest Post
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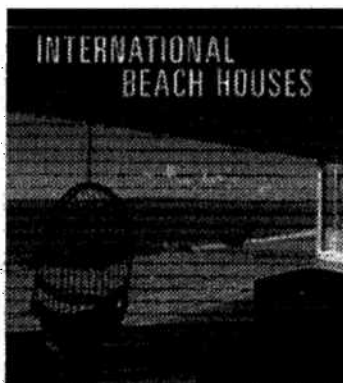
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About the Author

Louisa Wattson is an expert on twentieth-century architecture and design. She has coauthored several books on

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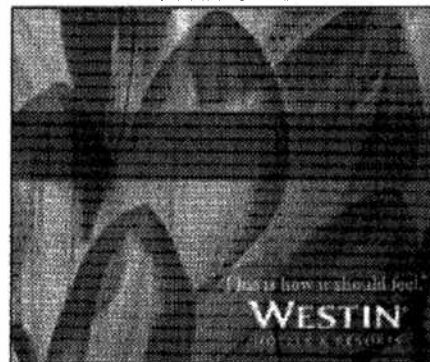
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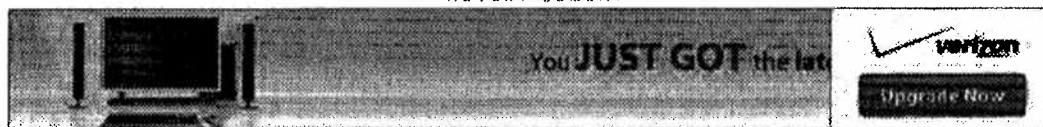
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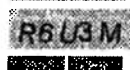
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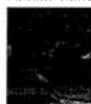
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